

¹ The Board notes that, following the November 4, 2020 decision, OWCP received additional evidence. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

lower leg, bilateral; and osteoarthritis lower leg, bilateral.² On June 1, 2006 it expanded the acceptance of the claim to include left hip trochanteric bursitis secondary to rod placement.³ OWCP paid him wage-loss compensation.

On June 17, 2020 OWCP forwarded to SSA a Federal Employees Retirement System (FERS)/SSA dual benefits form.

On July 11, 2020 SSA completed the FERS/SSA dual benefits form setting forth appellant's SSA age-related retirement benefit rates with FERS and without FERS commencing May 2014. Beginning May 2014, the SSA rate with FERS was \$1,273.30 and without FERS was \$1,174.30; beginning December 2014 and December 2015, the SSA rate with FERS was \$1,294.90 and without FERS was \$1,194.20; beginning December 2016, the SSA rate with FERS was \$1,298.70 and without FERS was \$1,197.70; beginning December 2017, the SSA rate with FERS was \$1,324.60 and without FERS was \$1,221.60; beginning December 2018, the SSA rate with FERS was \$1,361.50 and without FERS was \$1,255.80; and beginning December 2019, the SSA rate with FERS was \$1,383.30 and without FERS was \$1,275.80.

OWCP completed a FERS offset overpayment calculation worksheet on August 26, 2020. It calculated the overpayment amount by determining the daily FERS offset amount and multiplying that amount by the number of days for the period May 1, 2014 through August 15, 2020. The form indicated that from May 1 through November 30, 2014 appellant received an overpayment of \$698.44; from December 1, 2014 through November 30, 2015, he received an overpayment of \$1,211.72; from December 1, 2015 through November 30, 2016, he received an overpayment of \$1,215.04; from December 1, 2016 through November 30, 2017, he received an overpayment of \$1,215.33; from December 1, 2017 through November 30, 2018, he received an overpayment of \$1,239.40; from December 1, 2018 through November 30, 2019, he received an overpayment of \$1,273.09; and from December 1, 2019 through August 15, 2020, he received an overpayment of \$917.88, for a total overpayment of \$7,770.90.

On August 26, 2020 OWCP issued a preliminary overpayment determination, finding that an overpayment of compensation in the amount of \$7,770.90 had been created. It explained that the overpayment occurred because appellant's SSA age-related retirement benefits that he received from May 1, 2014 through August 15, 2020 were partially based on credits earned while working for the Federal Government, and that this portion of his SSA benefit constituted a prohibited dual benefit. OWCP found appellant not at fault in the creation of the overpayment and forwarded an

² By decision dated February 8, 2000, OWCP granted appellant a schedule award for 42 percent permanent impairment of his right leg and 7 percent permanent impairment for his left leg. The schedule award ran for the period January 30, 2000 through October 14, 2002.

³ By decision dated November 2, 2007, OWCP granted appellant a schedule award for 8 percent additional permanent impairment of his right lower extremity and 43 percent additional permanent impairment of his left lower extremity. The award ran for 146.88 weeks for the period October 28, 2007 through August 21, 2010. The case record contains a September 28, 2007 letter from appellant to OWCP, indicating, among other things, that appellant was not entitled to Office of Personnel Management (OPM) annuity benefits because he was "hired as a temporary overhire." At the bottom of the November 1, 2007 schedule award payment plate, OWCP indicated that appellant was not entitled to an annuity from OPM. After payment of each schedule award OWCP resumed payment of wage-loss compensation on the periodic compensation rolls.

overpayment action request form and an overpayment recovery questionnaire (Form OWCP-20). It requested that he provide supporting financial documentation, including income tax returns, bank account statements, bills and cancelled checks, pay slips, and any other records to support his reported income and expenses. OWCP afforded appellant 30 days to respond.

In an August 27, 2020 letter, OWCP notified appellant that, based on the information provided by SSA regarding the amount of his age-related retirement benefits, which were attributable to federal service, his FECA wage-loss compensation had been adjusted. It advised him that he would receive \$2,811.77 in net FECA wage-loss compensation every 28 days after the SSA offset.

On the overpayment action request form dated September 1, 2020, appellant disagreed that the overpayment occurred and requested waiver as he was found to be without fault in the creation of the overpayment. He asserted that he was given incorrect information. Appellant indicated that he was in receipt of workers' compensation under OWCP, not retirement benefits. A completed Form OWCP-20 and financial information were not received.

By decision dated November 4, 2020, OWCP finalized its preliminary overpayment determination, finding that appellant had received an overpayment of compensation in the amount of \$7,770.90 for the period May 1, 2014 through August 15, 2020, because it had failed to offset his compensation payments by the portion of his SSA age-related retirement benefits that were attributable to his federal service. It further found that he was without fault in the creation of the overpayment, but denied waiver of recovery of the overpayment because the evidence of record was insufficient to establish that recovery of an overpayment would defeat the purpose of FECA or would be against equity and good conscience. OWCP required recovery of the overpayment by deducting \$703.00 every 28 days from appellant's continuing compensation payments.

The Board finds that OWCP did not meet its burden of proof to establish that appellant received an overpayment of compensation.

OWCP's procedures provide that an overpayment occurs when FECA compensation is not reduced by the FERS/FECA offset amount. Since the SSA will not report an offset amount until after SSA benefits are received, an overpayment will almost always occur and will need to be calculated for each period in which the offset amount was not withheld from compensation.⁴ The offset provision of 5 U.S.C. § 8116(d)(2) and applicable regulations apply to SSA age-related retirement benefits that are attributable to federal service.⁵ FECA Bulletin No. 97-09 provides that FECA benefits have to be adjusted for the FERS portion of SSA age-related retirement benefits because the portion of the SSA benefit earned as a federal employee is part of the FERS retirement package, and the receipt of FECA benefits and federal retirement concurrently is a prohibited dual benefit.⁶ In identifying the fact and amount of an overpayment of compensation following a

⁴ Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Identifying and Calculating an Overpayment*, Chapter 6.200.1 (h) (September 2018).

⁵ See 5 U.S.C. § 8116(a), (d); 20 C.F.R. § 10.421(a).

⁶ FECA Bulletin No. 97-09 (issued February 3, 1997).

claimant's receipt of age-related SSA age-related retirement benefits, the Board has observed that OWCP uses a FERS offset overpayment calculation worksheet.⁷ The form sets forth the SSA-reported information as to the effective date and rates of SSA age-related retirement benefits with and without FERS. Following receipt of the purported SSA calculations, a preliminary determination of overpayment is issued if a prohibited dual benefit was received.⁸

The Board has observed, however, that not all federal employees are enrolled in FERS. Some FECA claimants are enrolled in another retirement program, such as the Civil Service Retirement System (CSRS). Other federal employees are not entitled to be enrolled in a federal retirement program. Therefore, OWCP's procedures with regard to requesting offset information are not applicable to all recipients of FECA compensation and SSA age-related retirement benefits. Therefore, the information solicited on the FERS offset overpayment calculation worksheet that OWCP sends to SSA is not applicable to non-FERS claimants and does not establish either the fact or amount of an overpayment.

Herein, the evidence of record does not establish that appellant was enrolled in FERS. Appellant stated, in his September 1, 2020 overpayment action request form, that he was not in receipt of retirement benefits. The record contains correspondence from appellant dated September 28, 2007 in which appellant advised OWCP that he could not elect annuity benefits from OPM because he was hired by the employing establishment as a temporary employee and was not entitled to annuity benefits. Additionally, OWCP previously indicated, in November 2007 payment records, that appellant was not entitled to an annuity from OPM.

The Board thus finds that OWCP did not meet its burden of proof to establish that appellant received an overpayment of compensation during the period May 1, 2014 through August 15, 2020.

⁷ *Id.*

⁸ *Supra* note 2.

IT IS HEREBY ORDERED THAT the November 4, 2020 decision of the Office of Workers' Compensation Programs is reversed.

Issued: January 24, 2022
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board